IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-81

MIRIAM WINTERS,

Appellant,

against

THE COMMISSIONER OF THE DEPARTMENT OF SOCIAL SERVICES, STATE OF NEW YORK and THE NEW YORK CITY COMMISSIONER OF SOCIAL SERVICES,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

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MOTION TO DISMISS

Appellee Commissioner of the New York State Department of Social Services respectfully moves the Court, pursuant to Rule 16, to dismiss this appeal on the ground that appellant has failed to raise a substantial federal question.

Opinions Below

The order of the Court of Appeals of the State of New York dismissing appellant's appeal *sua sponte* on April 29, 1976, on the ground that no substantial constitutional question was directly involved is reported at 39 N Y 2d 832. A copy of the order is reproduced as an appendix

herewith. The decision of the Appellate Division of the Supreme Court, First Department is reproduced at p. A-1 of the appellant's jurisdictional statement, and is reported at 49 A D 2d 843, 373 N.Y.S. 2d 604 (1975). The matter was transferred by the Supreme Court, New York County to the Appellate Division for disposition in the first instance pursuant to §§ 7803 and 7804(g) of the New York Civil Practice Law and Rules by order dated May 28, 1974.

Jurisdiction

The order of the Court of Appeals was issued on April 29, 1976. Appellant's undated Notice of Appeal to this Court was received by the Attorney General's office on or about July 26, 1976.* Appellant has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

Question Presented

Whether the denial of payment by the local authorities to appellant of asserted [but actually unproved] Christian Science Nursing Services because they fall within the class of unlicensed services which are excluded from compensation is to be overruled because of asserted effect on the exercise of the First Amendment?

Statement of the Case

On May 28, 1974, appellant commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules seeking to annul a determination dated February 20, 1974 (A-16-18)** by appellee State Commissioner

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* Appellant's notice of appeal has not been filed with the Clerk of the New York County Supreme Court, as required by NYCPLR § 5515, and by this Court's Rule 10, subdivision 3.

** Reference is to appendix to appellant's jurisdictional statement.

of Social Services after a statutory hearing, which affirmed a decision of the New York City Department of Social Services denying appellant's request for the payment of claimed cost of Christian Science nursing care.

Appellant, an adult who lives as a recluse in the St. George Hotel in Brooklyn (H.M. 3)* is a recipient of public assistance. She claims to be a follower of the beliefs of Christian Science, although not a member of the Christian Science Church (A-14) and chooses not to avail herself of the services of physicians and registered nurses. Here, she claims to have been treated by a "Christian Science nurse", the asserted cost of whose services appellant wishes to have paid by Medicaid.

Allegedly because of her reclusive habits, appellant did not appear at the hearing requested by her nor did she want a home hearing which was offered (H.M. 3). The only testimony on her behalf was given by her attorney, the counsel below and on this appeal. There was no actual proof of the rendition of any nursing services other than her attorney's attempt to buttress the claim by his own assertions.

In the Determination After Hearing, dated February 20, 1974, appellee State Commissioner affirmed the agency's determination denying payment for the services of a Christian Science nurse on the ground that the Social Services Law and Departmental Regulations make no provision for such payment for services by an unlicensee, without determining the question as to whether such alleged services were rendered and were necessary.

The Appellate Division held that the request for payment of the cost of Christian Science nursing care was properly denied. That Court held that:

> "Aside from the fact that a Christian Science nurse is not classified as a registered nurse (Education

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* Reference is to minutes of hearing held December 18, 1974.

Law § 6901 et seq.), petitioner has not demonstrated that she is entitled to payments pursuant to Social Services Law § 365-a, since there is insufficient in the record to indicate either the nature of her illness or of the treatment which she received." (A-4).

A notice of appeal to the New York Court of Appeals on constitutional grounds was dismissed by that Court *sua sponte* on the ground that no substantial constitutional question was directly involved.

ARGUMENT

There is no merit in the assertion that the State is required upon religious grounds to pay for "Christian Science" nursing care.

The Medical Assistance program under which appellant sought payment for the services of a Christian Science nurse is administered by the State and partially funded by the Federal Government. The Social Security Act and federal regulations provide for Federal financial participation in payment for Christian Science nursing care only if permitted by state law, 42 U.S.C. 1396d(a)(1)(17); 45 C.F.R. § 249.10(b)(15)(iii). Section 365-a, subdivision 2(d) of the New York Social Services Law provides that payment for nursing services may be made only if the services had been given by or under the supervision of a registered nurse. Under Article 139 of the Education Law (§ 6901, et seq.), a Christian Science nurse (unless qualified as prescribed in § 6904) is not a registered nurse. Thus, appellee State Commissioner correctly held that appellant was not entitled to the payment sought under both the federal and state statutory provisions.

There is no rational support for the appellant's argument that New York is required to include Christian Science nursing care in the range of services offered to

medicaid recipients when Federal statute and regulation provides that the State has the option not to do so. Indeed, appellant never challenged this statute and regulation below.

The New York Education Law provides strict standards for the licensing of health care professionals, including nurses. See Education Law, Articles 131, 131A, 132, 133, 139, 141 and 143. The restriction of state funds available for medical assistance to those providers of medical services who are licensed, or are supervised by licensed professionals, is an appropriate and reasonable expression of public policy. The Education Law does not prohibit the activities of self-styled Christian Science nurses, Education Law § 6907, subd. 1(g). Appellant incorrectly argues, however, that the language of the statute exempting Christian Science nurses from licensing means the State "recognizes" them thus bringing them within the ambit of the Federal regulations (Jurisdictional Statement p. 10). Exemption from licensing and regulation is not the legal equivalent of being licensed and regulated. Payment for services in question has properly been denied because the Christian Science nurse's care falls within the class of unlicensed nursing services which are excluded from medicaid compensation simply because not regulated.

The State has a firm right to marshal its resources in such a way as it concludes will provide the most qualified treatment within the limit of such resources. *Dandridge* v. *Williams,* 397 U.S. 471 (1970). The denial of compensation is in line with this policy of the State and is a consequence of the unlicensed and unregulated status of the Christian Science nurses involved in this case and is not based on any action, direct or indirect, against the use of prayer as a theraputic agency. To authorize compensation would accord Christian Science practice a preference over other practices of the healing arts. The State's position is absolutely neutral. Any Christian Scientist

who qualifies as a registered nurse is in no wise prohibited from the use of prayer.

The right of the State to oversee all professions concerned with health and to set up educational requirements and proficiency tests is well established. *Robinson* v. *California,* 370 U.S. 660, 664 (1962); *Barsky* v. *Board of Regents,* 347 U.S. 442, 449 (1954); *Dent* v. *West Virginia,* 129 U.S. 114, 123-25 (1889); *Graves* v. *Minnesota,* 272 U.S. 425, 428-29 (1926). This includes the right to establish professional standards the practitioner must meet in order to come within the category of services qualified for reimbursement under the Medicaid program. *American Physicians & Surgeons* v. *Matthews,* 395 F. Supp. 125 (N.D. Ill., 1975), *aff'd.* —— U.S. ——, 96 S. Ct. 388, citing *Rasulis* v. *Weinberger,* 502 F. 2d 1006 (7th Cir. 1974).

Obviously, *Sherbert* v. *Verner,* 374 U.S. 398 (1963), has no application here. Belief in Christian Science has no relevance or impact on the ability to obtain a professional license by showing the educational qualifications and proficiency stipulated in the Education Law, which is a reasonable condition set up by the State in order to entitle it to reimbursement under the Medicaid program. The State's interest in insuring the possession of such qualifications as a condition to entitlement to reimbursement is clearly sufficient to sustain this limitation. *Johnson* v. *Robinson,* 415 U.S. 361, 94 S. Ct. 1160 (1974). The State court was fully warranted in concluding that there was no substantial constitutional question raised by appellant.

CONCLUSION

This appeal should be dismissed for want of a substantial federal question.

Dated: New York, New York, September 15, 1976.

Respectfully submitted,

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APPENDIX

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of April A. D. 1976

PRESENT, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

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1 Mo. No. 457 SSD 34
Miriam Winters,

Appellant,

vs.

The Commissioner of the New York State Department of Social Services and the Commissioner of the New York City Department of Social Services, Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the Appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court